88-1062

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No._____

IN THE

Supreme Court of the United States

October Term, 1988

BEER WHOLESALERS, INC.,

Petitioner,

vs.

MILLER BREWING COMPANY, and
PHILIP MORRIS INCORPORATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND MINNESOTA COURT OF APPEALS

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QUESTIONS PRESENTED

The resale price maintenance issues in this case revolve around the retaliatory motive behind the termination of the Petitioner, a beer distributor, by Respondent, Miller Brewing Co. It is a straightforward resale price maintenance case (not a "dealer noise" case) and, as such, the facts and the antitrust claims present this Court with the full panoply of issues that are currently a matter of debate and conflict among the Federal Courts of Appeals when considering questions of resale price maintenance in light of the opinions of this Court in *Monsanto Co. v. Spray-Rite Service*, 465 U.S. 752, 104 S.Ct. 1464, (1984) and *Business Electronics v. Sharp Electronics*, —— U.S. ——, 108 S.Ct. 1515 (1988). Most significant of the debated questions revolving around the criteria for finding an illegal "contract, combination or conspiracy" appear to be the following:

1. Judge Posner, as will be cited hereinafter, has raised the broad question of exactly what is left of the rule against resale price maintenance after this Court's decision in the *Monsanto* case?

2. The Ninth Circuit not only conflicts with Judge Posner for the Seventh Circuit on the issue of coercive resale price maintenance, but also has expressly questioned, as will be cited hereinafter, whether the "*Albrecht*-type of conspiracy" [i.e. between the coercive supplier and the coerced distributor] survives the teaching of this Court in *Monsanto*?

3. Under the teaching of this Court in *Monsanto, Matsushita* and *Business Electronics*, what is the quantum of proof necessary for a resale price maintenance claim to survive a motion for summary judgment, to establish a "contract,

combination or conspiracy" as the unlawful motive for the termination and arising between:

a. Supplier and terminated distributor?

b. Supplier and succeeding distributor?

c. Supplier and its other distributors?

4. This case also presents factual instances for this Court to re-examine and reaffirm or alter its oft-questioned teaching of uniformity of *per se* treatment under the antitrust law where a supplier coerces *higher* resale prices [minimum resale price maintenance] and at another time coerces a *lower* resale price [maximum resale price maintenance] by the independent distributor.

PARTIES TO THE PROCEEDING

Wallace C. Bohrer, Sr. was at one time an individual plaintiff, but is since deceased. East Side Beverage Company was at one time a defendant, but has since settled with Petitioner.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND MINNESOTA COURT OF APPEALS

The Petitioner, Beer Wholesalers, Inc. respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Minnesota Court of Appeals entered in this case on June 21, 1988 and the denial of a Petition For Review thereof by the Minnesota Supreme Court entered in this case on August 24, 1988.

OPINION BELOW

The order of the Minnesota Supreme Court was without opinion and appears in the Appendix hereto. The opinion of the Minnesota Court of Appeals is reported at 426 N.W.2d 438

(Mn.App.1988) and appears in the Appendix hereto. The opinion of the Minnesota district court, insofar as it granted Respondents' motions for summary judgment on the antitrust claims, also appears in the Appendix.

JURISDICTION

The judgment of the Minnesota Court of Appeals was filed on June 21, 1988. The Minnesota Supreme Court denied a Petition For Review on August 28, 1988. Petitioner applied to this Court for an extension of time within which to file for Writ of Certiorari. Mr. Justice Blackman granted the Application on October 12, 1988 extending said time to, and including, "22 December, 1988".* This Petition for Writ of Certiorari was filed within said time period. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) and decisions of this Court. Respondents contested jurisdiction in opposition to Petitioner's application for extension of time within which to file for Writ of Certiorari.

In granting summary judgment against the antitrust claims in this case the Minnesota Court cited and relied *entirely* on Federal Court decisions, mostly of this Court. There was no independent State ground in this case. This Court requires "a plain statement of an independent State ground" in such a case. *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983). The test set forth in that case by this Court at 463 U.S. 1041 is as follows:

> If the State Court decision indicates clearly and expressly that it is alternatively based on bona fide separate,

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* By Order dated October 28, 1988, in *Stowman v. Carlson Cos.*, M.C.A. #C3-88-916, the Minnesota Court of Appeals held Rule 140.01 of the Minnesota Rules of Civil Appellate Procedure to be an absolute bar against any petition for rehearing.

> adequate, and independent grounds, we, of course, will not undertake to review the decision.

In footnote 7 therein this Court said as follows:

> . . . We require a clear and express statement that a decision rests on adequate and independent State grounds.

The instant case clearly meets the test of this Court in *Long* where it said as follows:

> "Our review of the decision below under this framework leaves us unconvinced that it rests upon an independent State ground. Apart from its two citations to the State Constitution, the Court below relied *exclusively* on its understanding of *Terry* and other federal cases. Not a single State case was cited to support the State Court's holding . . ."

The Minnesota Court below followed the same procedure. First, it made brief citation to the State Statute regarding a "contract, combination, or conspiracy . . .". Apart from that citation, the Minnesota Court went on to exclusively apply federal antitrust law, including mostly decisional law of this Court. The opinion by the Minnesota Court clearly lacked the requisite "plain statement" that it rests on State grounds. Consequently, Justice Blackman's rejection of Respondents' contention of jurisdiction was correct. *See,* also *New York v. Class,* 475 U.S. 106, 109, 89 L.Ed.2d 81, 106 S.Ct. 960 (1986). Petitioner herein asserts that the Minnesota Court misconstrued and misapplied federal antitrust law. Such an assertion was held to be grounds for jurisdiction in *Murray v. Gerrick & Co.,* 291 U.S. 315, 316, 78 L.Ed. 821 (1933).

In sum, this Court has jurisdiction under the "plain statement" rule and any objection thereto by Respondents should be rejected if raised again in their response hereto.

STATUTES INVOLVED

Section 325D.51 of the Minnesota Antitrust Law of 1971, provides in pertinent part:

> A *contract, combination,* or *conspiracy* . . . is unlawful. [Emphasis added herein] [Minn. Stat. §325.8013]

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in pertinent part:

> Every *contract, combination* or *conspiracy,* . . . is declared to be illegal . . . .
> [emphasis added herein]

STATEMENT OF THE CASE

This is an action by a family-owned and run terminated distributor against its supplier. It alleges resale price maintenance activities during the course of dealing resulting in the motive behind the termination. It was first filed by Petitioner (Beer Wholesalers) in the United States District Court for the District of Minnesota seeking both injunctive relief against the retaliatory termination of Beer Wholesalers' distributorship of Miller beer brands and damages from the Respondents, the manufacturer-supplier Miller Brewing Co. (Miller) and its parent Philip Morris, Inc. and the successor distributor East Side Beverage Co. (East Side). In quick succession the federal court denied temporary injunctive relief on the basis of damages affording sufficient relief; Petitioner dismissed without prejudice and filed for and obtained temporary injunctive relief in state court under the relief provided for in the Minnesota Beer Brewers and Wholesalers Act against terminations "without cause"; Respondents immediately removed the action back to the federal court where the temporary injunction was dissolved and Petitioner and its attorney were enjoined from seeking temporary injunctive relief anywhere other than before that particular court; the federal court then granted Petitioner's motion for dismissal without prejudice so that the action could be refiled in state court, on the condition that temporary injunctive relief was not again sought; the action was then refiled in state court. Throughout this action, the Petitioner expressly pursued its resale price maintenance claims under the decisions of this Court and other federal courts. The state courts relied *entirely* on federal decisions.

The state district court granted summary judgment for Respondents, finding an insufficient showing of a conspiracy under the standard of proof set forth in this Court's opinion in *Monsanto Corp. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 104 S.Ct. 1464 (1984) and *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1987). The state district court did not address any of the extensive trail of evidence of resale price maintenance in the Record. Further, the state district court totally failed to recognize and address Beer Wholesalers' main allegations of a contract, combination or conspiracy existing between *itself* and Miller, i.e. an *Albrecht*-type conspiracy (cited hereinafter).

The state court of appeals affirmed the summary judgment. It did recognize the "three unlawful combinations" alleged by Beer Wholesalers, but found insufficient "agreement" on the part of Beer Wholesalers in response to the coercion by Miller. In so holding, that court exclusively cited, but misconstrued and misapplied, the decisions of this Court and federal appeals courts. As will be noted further herein, the state appeals court misunderstood and misstated certain pricing evidence in the Record. Also, that court inexplicably adopted Miller's characterization of Beer Wholesalers' theory as being that of a "refusal" to fix prices. Instead, what Beer Wholesalers expressly alleged, not only in its complaint but also in its briefs and distinctly in oral argument, is that it was terminated not because of its so-called "refusal", as argued by Miller, but because of its "resistance" to the resale price fixing demands of Miller. In fact, Beer Wholesalers acquiesced to the demands of Miller and changed its resale prices during the two most significant resale price fixing incidents in this case.

The facts, pertinent to the antitrust claims, are that Miller asked Beer Wholesalers to take on the distributorship of

Miller beer brands in the Minneapolis market territory starting in October of 1973. Miller had terminated its former distributor for the territory, O.M. Droney Beverage Company (Droney) who then sued Miller in the United States District Court for the District of Minnesota. Among the allegations made by Droney were certain resale price maintenance claims against Miller. Droney was afforded a trial on the merits before that Court. By order dated March 13, 1978 in the case titled, *O.M. Droney Beverage Company v. Miller Brewing Company*, Ct. No. 4-73 Civ. 492. Judge Alsop of that Court issued his findings of fact, conclusions of law and order for judgment wherein he found Miller guilty of resale price maintenance on two of the claims made by Droney. The findings, conclusions and order are not published (another order by the Court in that case is published at 365 F.Supp. 1067). Judge Alsop's order was filed March 13, 1978. He found that resale price maintenance activities of Miller had occurred during the term of the Droney distributorship and he assessed antitrust damages. He did find a separate justifiable business reason for the termination. In the instant case, Beer Wholesalers cited and relied upon Judge Alsop's findings of resale price maintenance activity of Miller as historical precedent bearing on the continued resale price fixing activity of Miller directed at Beer Wholesalers as the successor distributor to Droney. Over the five-year period of Beer Wholesalers distributorship, October 7, 1973 through October 8, 1978, Miller directed a stream of resale price maintenance activities against it. In every instance Beer Wholesalers *resisted* the resale price maintenance demands of Miller, thus refusing only in some instances but in other instances, partially or fully acquiescing thereto. Miller's motive for terminating Beer Wholesalers' distributorship was Beer Wholesalers' resistance to the resale price maintenance demands of Miller which deprived Beer

Wholesalers of its pricing freedom to the detriment of the public interest. While it had the distributorship, Beer Wholesalers attained large increases in sales of Miller brands and made substantial on-going investments in the distributorship to handle the Miller brands which, at the time of termination, comprised 80% of its business. The professionally appraised fair market value claimed for the loss of the distributorship at the time of termination in 1978 was $4,000,000.00.

The resale price maintenance activities of Miller began before Beer Wholesalers took over the distributorship from Droney and repeatedly occurred thereafter against Beer Wholesalers. When Droney was afforded a trial to the court, Judge Alsop's conclusions of law included, among others, as follows:

> 4.A.3 The conduct of Miller concerning the prices to be charged for Miller products by Droney from October 1969 through May 1971, involving policing and pressure by Miller and carrying the express or implied threat of termination, created a combination or agreement in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

The most significant of the resale maintenance incidents that occurred between Beer Wholesalers and Miller can be chronologically listed and highlighted as follows:

March, 1974:

12-Pack Can Co-op Price-off Promotion

Beer Wholesalers had just promoted the same 12-pack can package on a 40 cent - 40 cent co-op basis with Miller *twice* in November, 1973 and January 1974. On or about March 1974, Miller offered the identical co-op promotion, but it was just weeks after the second promotion had been concluded. Beer Wholesalers, in its best independent business judgment, felt that for it to absorb 40 cent again would be too much and

too soon after the promotion just concluded. Also, Beer Wholesalers was concerned that some of the smaller retailers in its market territory were expressly upset because some larger retailers were "foot balling" the price of the package from the January promotion. Further, some of its retailers still had ample inventory of the package from the recent January promotion. Miller threatened Beer Wholesalers' president as follows:

> If you don't cooperate *they won't allow you any monies from brewery co-ops.* You won't be able to discount. *If you don't go along with the whole amount they'll take it all away.*

Beer Wholesalers offered to co-op at 20 cents each but instead Miller paid it the full promotional 40 cents. Beer Wholesalers added the 20 cents it had said was the extent it would go at that time and gave a total of 60 cents off to retailers. It is significant that not only was that the *last* time that particular promotion was run by Miller in Beer Wholesalers' market area, but Miller did *not* offer any more co-op price promotions.

Late January, 1976:
Miller Lite 6-Pack Cans (first incident)

On January 21, 1976, Miller had given Beer Wholesalers a performance rating of just "fair". The consequence was that Beer Wholesalers would thereafter lose the credit terms that it had then been receiving from Miller. This put pressure on Beer Wholesalers. Just one or more business days after the rating, a senior executive of Miller (today he is the chief executive of Miller) came unexpectedly to the Beer Wholesalers warehouse and announced that the rating had been changed from "fair" to "satisfactory" and that this meant that Beer Wholesalers would *not* lose the credit terms from

Miller. Then, he asked that Beer Wholesalers lower the price of the Miller Lite 6-Pack can package by 30 cents per case to retailers. That meant that Beer Wholesalers would have had to give up its desired gross profit margin on this particular package and would have had to absorb the entire higher cost charged by Miller for the package. Miller told Beer Wholesalers that Miller wanted to be at the *same* price to consumers as the Schlitz Light product. However, Miller refused Beer Wholesalers' request for a lower dock price which would have enabled Beer Wholesalers to maintain the gross profit margin it felt, in the exercise of its independent business judgment, that it needed. Because of Miller's refusal of a lower dock price, Beer Wholesalers did not then lower its prices of the Lite brand package.

It is significant that in concluding the meeting, the senior Miller executive made the following threatening statement to Beer Wholesalers' president:

> If you tell anybody about me trying to get you to lower your price, *I will deny it.*

February, 1976:
Re: Miller Lite 6-pack Cans (second incident)

This incident involved the same senior executive of Miller who had undertaken to coerce Beer Wholesalers to lower its price to retailers by 30 cents per case. Now he returned *unexpectedly* to the Beer Wholesalers warehouse. It was not normal for such a senior executive to come to Beer Wholesalers' office. He said that Miller now wanted Beer Wholesalers to reduce the price of the Lite 6-pack cans by 5 cents per 6-pack for a total price cut of 20 cents per case to retailers. He was told by Wally Bohrer, Sr. that Wally Bohrer, Jr., the president of Beer Wholesalers, was out of town so that Beer Wholesalers could not then decide whether or not

to go along with this new price directive from Miller. Upon his return Wally Bohrer, Jr. again took the position that if Miller wanted to lower the price to the retailer, then Miller should lower its price to Beer Wholesalers a corresponding amount so that Beer Wholesalers could continue to make its desired normal gross profit margin on the package at the reduced price set by Miller. Beer Wholesalers would pass the Miller reduction in price on to its retailers. Again, Miller refused to lower its price to Beer Wholesalers and because of that, Beer Wholesalers did not lower its price.

Last two weeks of September, 1977:
"Domestic" Lowenbrau

Miller executives visited Beer Wholesalers office and directed it to set the per case price of the domestic-brewed Lowenbrau brand to retailers at a point where the resulting retailers' price to consumers would be 50 cents per 6-pack *over* the price that retailers sold Michelob (Anheuser Busch manufactured product) to consumers. The Miller price to Beer Wholesalers was to be $7.02 per case. Beer Wholesalers freight cost was 25 cents per case so the total laid-in cost to it was to be $7.27 per case. However, Beer Wholesalers wanted to make its normal gross profit margin of about 22%. Because the laid-in cost to Beer Wholesalers charged by Miller was to be $7.27 that meant that the Beer Wholesalers price to retailers would have had to be $9.30 per case in order for Beer Wholesalers to make its normal gross profit margin. Miller told Beer Wholesalers that with Michelob being sold by retailers to consumers at $2.25 per 6-pack the Beer Wholesalers price to retailers had to be set at $8.56 per case so that Miller could maintain the 50 cents difference in price per 6-pack to consumers *above* the price of the Michelob. When Beer Wholesalers told Miller the higher price that, in its

independent business judgment, it wanted to sell at to retailers, Miller threatened as follows:

> That would be the RAPE of the Miller Brewing Company. They (Miller) *made extensive market research on pricing* and it *must be sold* at 50 cents to the consumer above the Michelob price. They've (Miller) *spent millions of dollars researching the pricing* and it's *got to be positioned at* that price.

In response to this threat by Miller, Beer Wholesalers said that if that was what Miller demanded then Miller should sell to Beer Wholesalers at a lower price to enable Beer Wholesalers to make its desired normal gross profit margin. Again, Beer Wholesalers asked if Miller would give it some help by lowering the Miller price to it at least some portion of the amount demanded for resale by Miller. Miller refused to answer the inquiry. Consequently, under this coercive threat by Miller, Beer Wholesalers lowered its price to retailers from $9.30 per case to $8.75 per case. Except for the coercive pressure of Miller, Beer Wholesalers would not have lowered its price.

Late May, 1978
General Price Raise

A Miller sales executive visited Beer Wholesalers' office and interrogated its president as follows:

> *When are you going to raise your prices?*

Beer Wholesalers' president replied as follows:

> *I have nothing definite on that.*

The Miller executive then threatened as follows:

> *You had better raise your prices soon or* the brewery will think that you don't need the money and *they will raise their prices to you more.* If you don't need the money *then they'll take it.*

The background to this was that Miller had first raised its prices to all its distributors in January-February, 1978. Beer Wholesalers had then raised its prices to retailers in February, 1978. Then, Miller raised prices to wholesalers a *second* time by sending out a Mailgram on April 20, 1978, effective June 1, 1978. East Side responded by raising its prices in the middle of June, 1978. As a result of the threat by Miller, Beer Wholesalers raised its prices for all of its packages of Miller products (over thirty some packages). But, on a popular package with which it competed with East Side, it raised the price only up to a level that stayed 10¢ *below* East Side's price. In retaliation, Miller quickly issued a 90-day notice to Beer Wholesalers that it was being terminated. East Side, which had a territory from Miller contiguous to Beer Wholesalers' territory, took over Beer Wholesalers' territory and eliminated the 10¢ lower price advantage that the retailers therein had enjoyed in buying the competitive package from Beer Wholesalers. *See*, the letter from a retailer in the Appendix hereto (A-21), complaining about the elimination of Beer Wholesalers and the resulting 10¢ price increase by East Side.

The state courts misconstrued and misapplied both the decisions of this Court and the factual Record. Miller engaged in resale price maintenance against Droney, and successfully continued the practice against Beer Wholesalers in evasive defiance of Judge Alsop's findings that had condemned such activity.

REASONS FOR GRANTING THE PETITION

This case presents straightforward resale price maintenance facts from which the foremost allegation of a "contract, combination or conspiracy" is an *Albrecht*-type. The continued viability of the *Albrecht*-type conspiracy theory has recently been expressly questioned by the Ninth Circuit Court of Appeals, as will be cited hereinafter. The instant case presents a well-documented course of conduct. The issue is what quantum of proof of coercion is needed to prove resale price maintenance? On that issue alone, the Seventh Circuit and the Ninth Circuit Courts of Appeals are in conflict. The state court of appeals, in the instant case, sides with the Ninth Circuit Court of Appeals. The Eighth and the Sixth Circuits would seem to side with Judge Posner for the Seventh Circuit. The proof of vertical price restraints has been in a state of growing obfuscation. In considering this subject one should refer to the review in ABA Antitrust Section Monograph No. 2 "Vertical Restrictions Limiting Intrabrand Competition" (1977). Also, the review titled, "Monsanto's Legacy: Ten Recent Cases Involving Distributor Terminations" by Steven A. Asher, May 1988, in the publication titled, *"DISTRIBUTION"*, by *LAW JOURNAL SEMINARS-PRESS*, pages 399-423, (1988). In that same publication see the review titled, "To What Degree Do The Federal Laws Limit The Controls That The Seller Can Impose Upon The Buyer" by James F. Rill, May 1988, pages 473-480 (1988). On pages 474-476 Mr. Rill cites and discusses "cases where conspiracy demonstrated". Finally, the bitter confusion surrounding this Court's most recent decisions in this area of antitrust law is exemplified in the severe critique published in Volume 102 of the *Harvard Law Review*, No. 1, November 1988, pages 297-308.

Apparently the lower federal courts are in conflict with each other in this area of antitrust law and it seems to be that is the result of growing confusion as to the teachings of the most recent decisions of this Court. This Court recently denied Petition For Certiorari in *The Garment District, Inc. v. Belk Stores Services, Inc., et al.*, 108 S.Ct. 1728. That was simply another so-called "dealer noise" case like *Monsanto*. Certiorari was also denied in the *Isakson v. Vermont Castings* case, 108 S.Ct. 1728 where, although relied on by Petitioner here because of Judge Posner's teaching therein, the claim was chastized by Judge Posner because of the great lapse of time between the coercive threats and the price change (one year). In contrast, the straightforward timely facts in the instant case present this Court with the opportunity to fully address the outstanding questions in this area of antitrust law to clear up the confusion and resolve the conflict below.

Those questions include the quantum of proof of coercive conduct required to amount to resale price maintenance and how specific must the resulting agreement be to amount to resale price maintenance. This Court should consider what degree of proof is necessary to show that an independent distributor has lost its 'real-world right' to determine independently its resale price?

THIS COURT SHOULD REAFFIRM THE VIABILITY OF THE ALBRECHT-TYPE CONSPIRACY, THE CONTINUED EXISTENCE OF WHICH HAS RECENTLY BEEN QUESTIONED BY THE NINTH CIRCUIT COURT OF APPEALS.

This area will be more fully discussed under the question of anticompetitive vertical coercive conduct, but first it should be centered on the continued viability of the *Albrecht*-type con-

spiracy, i.e. between the coercive supplier (Miller) and the coerced distributor (Beer Wholesalers). *Albrecht v. Herald Co.*, 390 U.S. 145, 150, n.6, 88 S.Ct. 869, 872 n.6 (1968). That is the first and foremost type of conspiracy claimed by Beer Wholesalers. The state district court failed to grasp or address the concept. The state appeals court recognized the concept but found insufficient coercive conduct to support it. Now, the Ninth Circuit has questioned its survivability after this Court's decision in *Monsanto. See, The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1156, n.6 (9th Cir. 1988) [cert. not applied for]. This Court should affirm the survival of the *Albrecht*-type of conspiracy after *Monsanto* and also consider what proof of coerciveness needs to be shown to survive a motion for summary judgment. That question, on which the Seventh and Ninth Circuits conflict, is argued more fully immediately hereinafter.

THE PROOF OF COERCIVE TACTICS OF MILLER RESULTING IN BEER WHOLESALERS CHANGING ITS PRICES SHOULD BE HELD TO BE RESALE PRICE MAINTENANCE.

The facts of the instant case clearly fall within the teaching example set forth by Judge Posner in *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987), *cert. den.* —— U.S. —— (1988). However, the Ninth Circuit is in conflict as a result of its endorsement of such coercive tactics in *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1159 (9th Cir. 1988). The state appeals court herein took the stance of the Ninth Circuit. For example, it failed to fully quote the coercive threats, thus losing some of the coercive impact and lessening the conspiratorial scope of the statements. It also characterized the "Rape" threat as "an unserious remark".

(A-12) The coercive remarks of the three cases are set forth as follows:

Example by Judge Posner in Isaksen:

Supplier: "Raise your price by next Thursday, or I'll ship you defective goods."

Dealer: Merely grunts, but complies.

[*Actual Facts:* "Raise your prices or else"]

Facts of Beer Wholesalers, May 1978 Incident:

Supplier (Miller): "you had better raise your prices soon . . . *or the brewery will raise their prices to you more.* If you don't need the money *then they'll take it.*"

BW: Complied by raising prices of *all* packages. [On highly competitive package size the price was raised to a level 10¢ *below* East Side.]

Judge Posner concluded that if the above example is not actionable as an agreement to fix the dealer's resale price, under the decisions of this Court, there would be little left of the rule against vertical price fixing. [825 F.2d at 1164]. He distinguished and may conflict with the position of Professor Areeda over the resulting effect of this Court's opinion in *Monsanto,* 825 F.2d at 1164. He concluded that the 75-year-old rule of this Court against resale price maintenance has not been relaxed by this Court. Obviously, the Ninth Circuit conflicts with his view as it endorsed coercive threats by the supplier in *The Jeanery* case as follows:

> Well, what was said to me was *orders could be lost,* could be *shipped to the wrong destination,* or just *never processed.* [849 F.2d at 1159]

There was a vigorous dissent by Judge Reinhardt as to the effect of this Court's opinions in *Monsanto* and *Business Elec-*

tronics. Clearly, the lower federal courts are in disarray and conflict and the subject needs the updated consideration and teaching of this Court.

It should be noted that the above-quoted threatened coercive acts have in themselves, if carried out, been held to be conduct violative of the antitrust laws. The Eighth Circuit termed such acts as "dirty tricks" in *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 697 (8th Cir. 1984) (citing the Sixth Circuit in note 4). The Third Circuit has recently termed such acts as "trickery and chicanery" in holding on remand from this Court that a termination case met the *Matsushita* standard. *Tunis Bros. Co. Inc. v. Ford Motor Co.*, 823 F.2d 49, 51 (3rd Cir. 1987). The facts of the instant case show similar bad faith tactics in the retaliatory termination of Beer Wholesalers—East Side dumped overage beer into Beer Wholesalers' market territory which Miller then held against the performance of Beer Wholesalers. Miller representatives "bad mouthed" Beer Wholesalers to retail customers of Beer Wholesalers. Miller favored East Side with supply of product and advertising materials. Miller's motive for terminating Beer Wholesalers was retaliation against Beer Wholesalers' *resistance* to the resale price maintenance conduct of Miller. von Kalinowski, *Antitrust Laws and Trade Regulation*, Volume 2, §6B.02[2] n.46 at page 6B-21 states as follows:

> The fact that a refusal to deal is implemented by exercise of a contractual right of termination or non-renewal is, of course, no defense where the refusal to deal is otherwise violative of the antitrust laws.

THE COURT SHOULD REAFFIRM AND UPDATE ITS TRADITIONAL TEACHINGS ON PROVING A "CONTRACT, COMBINATION OR CONSPIRACY" FOR RESALE PRICE MAINTENANCE.

The state court of appeals required agreement on a "specific" price. (A-12) This conflicts with Judge Posner in *Isaksen* where he found a contract, combination or conspiracy to exist in:

> ". . . an informal agreement by Isaksen, *knuckling under to pressure* by Vermont Castings, to *raise* his prices." [825 F.2d at 1162]
> (Emphasis added herein.)

The jury was allowed to find liability, even though Isaksen did not raise his price until a year after the threat from his supplier [825 F.2d at 1163] In contrast, Beer Wholesalers acquiesced and changed its prices quickly in response to the demand of Miller. Judge Posner did hold the damages excessive, but distinguished Beer Wholesalers type of case:

> "*Unlike the usual dealer antitrust case, Isaksen was not terminated,* so he can claim damages only from . . ." [825 F.2d at 1164] (Emphasis added herein.)

Hornbook antitrust law states the combination or conspiracy element can be found to exist in the course of dealing between Miller and Beer Wholesalers. *Eg.* see the widely cited antitrust Hornbook by Professor Sullivan, *Sullivan, Law of Antitrust,* Chapter 5 at page 394 cites such a "combination" in a terminated dealer situation. Also see, von Kalinowski, *Antitrust Laws and Trade Regulation,* Volume 2, §6B.02 [2] at page 6B-23:

> "Since it is now well settled that a combination may be inferred where the supplier employs coercive tactics to enforce its resale prices and the buyer unwillingly complies, . . ."

In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968) this Court held that a plaintiff-franchisee had formed an unlawful combination with the franchisor "the day he unwillingly complied with the restrictive franchise agreeements." See also, *Simpson v. Union Oil Co.*, 377 U.S. 13, 16-17 (1964) where the requirement of concerted action was found to be met between plaintiff and the defendant.

The terms "contract", "combination" and "conspiracy" in §1 of the Sherman Act were used in a broad sense of arrangements which had an effect upon prices, and were not used in the simple sense of a "contract". *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 498 (1940). The Senate resolution, which in 1888 directed the formulation of the bill, sought measures to set aside, control, restrain or prohibit "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, . . . which tend to prevent *free and full competition* . . . with such penalties and provisions . . . as will tend to preserve freedom of trade and production, the natural competition of increasing production, the lowering of prices by such competition." *Id.* at 493, n.15 (emphasis by the Court).

Saying that "[t]he Sherman Act has been so frequently and recently before this court as to require no extended discussion now" this Court in *Eastern States R.L.D. Assoc. v. United States*, 234 U.S. 600, 609 (1914) repeated its earlier holding in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911) that:

> "It [the Sherman Act] covered any illegal means by which interstate commerce is restrained . . . whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, *threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter.*" 234 U.S. at 611 (Emphasis added herein).

Federal Trade Com. v. Beech-Nut Packing Co., 257 U.S. 441, 455 (1922) held that the Sherman Act was violated by coercive methods "in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose."

United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722 (1944) noted that in *Beech-Nut* the company "without agreements, was found to suppress the freedom of competition by coercion of its customers. . . ."

United States v. Parke, Davis & Company, 362 U.S. 29, 43 (1960), following *Beech-Nut*, and finding adherence to prices as a result of coercion, held that "an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied. . . ." (Emphasis by the Court.)

Simpson v. Union Oil Company of California, 377 U.S. 13, 17 (1964) stated that "[w]e made clear in *United States v. Parke, Davis & Co.* . . . that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. *We reiterate that view, adding that it matters not what the coercive device is.*" (Emphasis added herein.)

Albrecht v. The Herald Co., 390 U.S. 145, 149, 150 n.6. (1968) held that §1 of the Sherman Act "covers combinations in addition to contracts and conspiracies, express or implied",

that in *Parke, Davis* "[t]he combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination" and that "[u]nder *Parke, Davis* petitioner could have claimed *a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price.*" (Emphasis added herein.)

Many different types of coercive devices have been used whereby resale price maintenance has been secured and the federal courts of appeals have uniformly held that the combinations achieved violate §1 of the Sherman Act. *See, Bowen v. New York News, Inc.*, 522 F.2d 1242, 1254-56 (2nd Cir. 1975), *cert. denied*, 425 U.S. 936 (1976) (surveillance and retaliation); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 53 (2nd Cir. 1980) (threats of non-renewal of annual lease); *Osborn v. Sinclair Refining Company*, 324 F.2d 566, 574 n.13 (4th Cir. 1963) ("If the arrangement or combination between the seller and his dealers is put together through the coercive tactics of the seller alone, this is sufficient."); *Phillips v. Crown Central Pet. Corp.*, 602 F.2d 616, 627 (4th Cir. 1979) *cert. denied*, 444 U.S. 1074 (1980) ("Short-term leases have been found to be inherently coercive. . . . Plaintiffs . . . were threatened with abrupt cancellations. . . ."); *Guidry v. Continental Oil Co.*, 350 F.2d 342, 343 (5th Cir. 1965) ("A supplier may not use coercion on its retail outlets to achieve resale price maintenance." Use of short-term leases to secure prices.); *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965) (same as *Guidry*); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 32-35 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972) (threats to vary "temporary competitive allowance" for dealers; the treatment of the plaintiff was deemed to be a threat to others); *Greene v. General Foods Corp.*, 517 F.2d

635 (5th Cir. 1975), *cert. denied,* 424 U.S. 942 (1976) (use of invoice forms to keep General Foods advised as to prices for major purchasers plus termination of dealership); *Bender v. Southland Corp.,* 749 F.2d 1205 (6th Cir. 1984) (abusive audits, termination threats, threats of opening a competing franchise); *Q.R.S. Music Co. v. Federal Trade Commission,* 12 F.2d 730, 732-33 (7th Cir. 1926) (A manufacturer "cannot lawfully by agreement fix and enforce the price at which the retailers shall sell. . . . Nor can respondent accomplish the same result by means that do not rise to the dignity of an express agreement. . . ."); *Hewitt v. Joyce Beverages of Wisconsin, Inc.,* 721 F.2d 625, 628 (7th Cir. 1983) ("Of course, knowledge that Joyce had actually coerced some distributors might cause other distributors to comply. . . ."); *Spray-Rite Service Corp. v. Monsanto Co.,* 684 F.2d 1226, 1234 (7th Cir. 1982) aff'd 465 U.S. 752 (1984) ("An unlawful resale price maintenance scheme can be effected in either of two ways: . . . an express or implied agreement . . . or the manufacturer may secure adherence to its suggested resale price through coercion. . . ."); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.,* 737 F.2d 698, 707 (7th Cir. 1984), *cert. denied,* 469 U.S. 1018 (1984) (the use of "persuasion and policing" in addition to announcement of a termination policy); *Arnott v. American Oil Company,* 609 F.2d 873 (8th Cir. 1979), *cert. denied,* 446 U.S. 918 (1980) (threat of nonrenewal of short-term leases and eventual cancellation of lease); *Canadian American Oil Co. v. Union Oil Co.,* 577 F.2d 468, 472 (9th Cir. 1978), *cert. denied,* 439 U.S. 912 (1978) (Denial of promised discount on price to dealer and eventual invocation of 90 day termination clause in gasoline supply contract. "We cannot say that the omnipresent threat of dealer contract cancellation for failure to conform one's retail prices to those

announced by Union's price support program is not coercive."); *Sahm v. V-1 Oil Company*, 402 F.2d 69 (10th Cir. 1968) (threat to terminate which was made before termination); *Adolph Coors Company v. F.T.C.*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (reports to dealers that other dealers had been cut off or would be because of their prices; *Black Gold, Ltd. v. Rockwool Industries, Inc.*, 732 F.2d 779, 780 (10th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984) (on rehearing) ("[W]e do not construe *Monsanto* as a retreat from those cases holding that a combination occurs between a seller and buyers 'whose acquiescence in [the seller's] firmly enforced restraints was induced by "the communication danger of termination."'")

In addition to the combination or conspiracy between Beer Wholesalers and Miller, it can also be found between Miller and East Side. The Eighth Circuit has stated that the fact that an outside entity materially aided the accomplishment of a defendant's plan with the knowledge of the purpose of the plan, is sufficient to satisfy the combination or conspiracy requirements. *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1266 (8th Cir. 1980), *cert. denied*, 499 U.S. 1063 (1980).

In summary, any *one* of the combinations or conspiracies herein is sufficient to satisfy the threshold requirement of the antitrust law. The Record contains evidence of all three, consequently, this Court should reverse the summary judgment.

It can be argued that the vertical price fixing by Miller is a *per se* violation of the antitrust law. Before extending the rule to vertical price fixing, this Court crafted the so-called "per se" standard of illegality in the context of horizontal antitrust cases. *See*, e.g. *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Addyston Pipe & Steel*

Co., 85 F.2d 271 (6th Cir. 1898) *aff'd* 175 U.S. 211 (1899). Then, in *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373 (1911), the Court struck down a resale price maintenance scheme as illegal *per se* by reasoning that the Sherman Act accorded all participants the distribution of goods the same freedom to make business decisions and that simply because a manufacturer makes the product and initiates the distribution scheme, "it does not follow [that] . . . he may impose on purchasers every sort of restriction." 202 U.S. at 404. In every situation in which the Court has subsequently been faced with the issue of vertical price restraints, it has not denied the holding in *Dr. Miles.* For example, *see, United States v. Colgate Co.*, 250 U.S. 300 (1919); *United States v. Schrader's & Son*, 252 U.S. 85 (1920); *F.T.C. v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. Line Material Co.*, 333 U.S. 287 (1948); *Kiefer-Stewart Co. v. Jos. E. Seagram & Sons, Inc.*, 340 U.S. 211 (1964); *California Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Rice v. Norman Williams Co.*, 458 U.S. 645 (1982); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Business Electronics Corp. v. Sharp Electronics Corp.*, —— U.S. ——, 108 S.Ct. 1515 (1988).

THE FACTS OF THIS CASE MEET THE "SOMETHING MORE" REQUIREMENT OF THIS COURT'S DECISION IN MONSANTO FOR A THIRD PARTY CONSPIRACY.

It is commonly referred to as the "plus factor" needed after *Monsanto* in order to show a third party conspiracy. This case has it.

First, with regard to the conspiracy alleged between Miller and East Side, the "plus factor" is a number of "dirty tricks, trickery and chicanery" by them against Beer Wholesalers.

East Side dumped overage Lowenbrau beer into Beer Wholesalers' market territory during the ninety-day pretermination correction period of the summeer of 1978. Beer Wholesalers repeatedly complained to Miller about it but Miller refused to help and instead held it against the performance rating of Beer Wholesalers. Also, during that critical "corrective" time period, Miller representatives made deprecatory statements regarding Beer Wholesalers to Beer Wholesalers' retailer-customers. The result was that some stopped buying from Beer Wholesalers and started buying from East Side which crossed over into Beer Wholesalers market territory—geographically delineated by Miller in the distributorship contract. Miller also favored East Side over Beer Wholesalers with shipments of beer in time of short supply and with supplies of advertising materials.

Second, with regard to the conspiracy alleged between Miller and its other distributors nation-wide, the "plus factor" is the showing of resale price maintenance on a national scale for the domestic-brewed Lowenbrau beer brand of Miller. The state court of appeals termed that threat an "unserious remark", but failed to quote the entire statement which is set forth hereinabove at page 13. In its entirety it clearly discloses a widely and expensively researched resale price maintenance scheme or cartel for all Miller distributors. Also, the state court of appeals noted, but failed to give effect to, the apparent disappearance of pricing chapters from the Lowenbrau national marketing plan book. (A-13) That book and other communications sent by Miller to all its distributors on the subject of that product disclosed a national plan for resale price maintenance. Because of its *resistance* to said plan and the other resale price maintenance demands of Miller, Beer Wholesalers was terminated by Miller.

THIS COURT SHOULD REAFFIRM THE PUBLIC POLICY BEHIND PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS.

Private enforcement of the antitrust laws against vertical restrictions has become increasingly confused and even checkmated under the decisions of this Court since the change of the position described in *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977). It added a plus factor requirement in *Monsanto*. Now, the unreality of the basis for the opinion in *Business Electronics* is being severely critiqued. The Court seems to have withdrawn from the "real-world" right of large and small businesses to strive for independent competitive survival. It has been some time now since this Court has extolled the virtues of the antitrust laws as the bedrock of the free enterprise system with the concommittant value of private enforcement of the antitrust laws. *See*, for example, the stirring remarks of the Court in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 92 S.Ct. 885 (1972). This Court reportedly has recently accepted review of the punitive damage award in the Second Circuit's decision in *Kelco Disposal, Inc. v. Browning-Ferris Industries*, 845 F.2d 404 (2nd Cir. 1988). It should be noted that, that Court endorsed the "two hats" worn by a private enforcer of the antitrust laws. One as a "private victim" and the other as "a public defender of broad social objectives", i.e. a "surrogate enforcer of the antitrust laws". 845 F.2d at 411.

Independence of pricing decision making by distributors enhances *both* intrabrand and interbrand competition in the particular geographic market in which it is most active and with which it is most familiar. *See*, *A.B.A. Monograph*, No. 9, "Refusals To Deal And Exclusive Distributorships" (1983) at page 12, and *A.B.A. Monograph*, No. 2, *supra*, at page 4, both cited hereinabove.

CONCLUSION

This case presents all relevant questions of fact and law covering the three types of resale price maintenance contracts, combinations or conspiracies. *First,* between the supplier (Miller) and the distributor (Beer Wholesalers), i.e. *Albrecht*-type. *Second,* between the supplier (Miller) and the successor-distributor (East Side), i.e. the *Monsanto*-type. *Third,* between the supplier (Miller) and its other distributors (East Side, et al.) on a national basis, i.e. an expanded *Monsanto*-type. The facts in this case also satisfy the "something more" requirement of *Monsanto.* In footnote 9 of the *Monsanto* opinion, this Court suggested that the concept of a "meeting of the minds" in a distributor-termination case, "includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement and that this was sought by the manufacturer". In *Isaksen* the defendant argued that this Court meant what it said literally. Judge Posner rejected that argument. The facts of the instant case comport with the view of Judge Posner. The Ninth Circuit and the state appeals court herein are in conflict with Judge Posner. This Court should clarify its view on the ample factual record provided for it to do so in this case.

Accordingly, a writ of certiorari should be issued to review the resale price maintenance issues raised by this case.

DATED: December 20, 1988.

Respectfully submitted,

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APPENDIX

IN THE

Supreme Court of the United States

No. ———

A-281

BEER WHOLESALERS, INC.,

Petitioner,

vs.

MILLER BREWING COMPANY, et al.,

Respondents.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including 22 December, 1988.

HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 12th day of
October, 1988.

STATE OF MINNESOTA
IN COURT OF APPEALS

C5-88-285

Hennepin County — Lansing, Judge

BEER WHOLESALERS, INC.,
Appellant,

WALLACE C. BOHRER, SR.,
Plaintiff,

vs.

MILLER BREWING COMPANY, et al.,
Respondents,

EAST SIDE BEVERAGE COMPANY,
Defendant.

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Filed: June 21, 1988
Office of Appellate Courts

SYLLABUS

1. Evidence was insufficient to raise a genuine issue of material fact on claims of breach of contract, fraudulent inducement, tortious interference, and violation of Minnesota antitrust and beer wholesalers acts.

2. Trial court did not abuse its discretion in taxing cost of depositions of appellant's chief officers.

Affirmed.

Heard, considered, and decided by Lansing, Presiding Judge, Randall, Judge, and Kalitowski, Judge.

OPINION

LANSING, Judge

When Miller did not renew its beer distributorship, Beer Wholesalers, Inc. (BWI), brought this action alleging various statutory violations and common law claims. The trial court entered summary judgment dismissing all claims, and BWI appeals. We affirm.

FACTS

On October 8, 1973, Miller Brewing and BWI signed a distributorship agreement which provided that

> [1] Miller would sell beer to the distributor "in such quantities as Distributor shall order and Miller shall accept."
>
> [2] the contract would automatically be renewed "[u]nless either party hereto shall, not less than ninety (90) days prior to the end of the initial term of this Agreement, give written notice to the other party of election not to renew this Agreement." No reason was required for nonrenewal of the contract.
>
> [3] the distributor's rights were fully set forth in the written contract.

[4] the distributor got unrestricted, non-exclusive territory in which to distribute, unless limited by state law.

[5] the agreement could be modified only by a writing signed by two Miller officers, although specific provisions could be waived by conduct of the party waiving compliance.

On June 28, 1978, more than 90 days before the expiration of the contract, Miller notified BWI of its intention not to renew the contract, citing various deficiencies in BWI's operation. BWI responded to the list of dissatisfactions item by item. During the final 90 days of the contract, BWI made several attempts to explain and correct the listed deficiencies, but Miller did not change its decision and the distributorship agreement expired on October 8, 1978.

BWI then brought this suit against Miller and East Side Beverage Company, a BWI competitor, alleging violations of the Beer Brewers and Wholesalers Act, contract law, tort law and antitrust law, and requesting compensatory damages of $26.6 million and punitive damages of $5 million plus costs and attorney's fees. East Side settled and was dismissed in 1985.

BWI appeals the entry of summary judgment dismissing its claims against Miller and also challenges the trial court's taxation of costs.

ISSUES

1. Did the trial court err in granting summary judgment for Miller?

2. Did the trial court abuse its discretion in taxing costs?

ANALYSIS

I

BWI and Miller do not dispute the existence or terms of the October 1973 distributorship agreement. BWI contends, however, that the agreement was modified by the notice of termination and Miller's subsequent conduct and that Miller breached the modified contract and an implied covenant of good faith; tortiously interfered with BWI's customers; fraudulently induced it to improve its distributorship in the hope of having it renewed; and violated Minnesota antitrust and beer wholesalers statutes.

A. Breach of contract.

The written agreement expressly provided that it could be modified only by a writing signed by two Miller officers, and there is no evidence that Miller waived either its right not to renew the agreement or the provision requiring a writing for modification. BWI argues that Miller's July 1978 notice of intention not to renew, which was signed by two Miller officers, gave rise to a new contract between the parties, the terms of which were established by a course of dealing between the parties during July, August and September 1978.

Although BWI does not state specifically the terms of the alleged modification, BWI appears to argue that Miller offered to renew if BWI remedied the listed deficiencies and that BWI accepted that offer by continuing to distribute Miller Beer and even adding new accounts. BWI further asserts that this modified agreement was breached by Miller's bad faith conduct after the notice of nonrenewal by failing to specify deficiencies, failing to stop another distributor selling beer in BWI's territory, failing to deliver beer orders, discontinuing manufacture of a brand of beer, and not renewing the agreement.

Whether a pre-existing agreement has been modified depends on the parties' objective manifestations, not their subjective understanding. *See Pine River State Bank v. Mettille,* 333 N.W.2d 622, 626 (Minn. 1983). In this case, as the trial court pointed out in its memorandum, Miller's conduct accorded with the terms of the written agreement. Although the nonrenewal letter listed BWI's alleged deficiencies, nothing in its language implies a promise to renew BWI if the deficiencies were corrected. Miller's conduct in reviewing BWI's attempts to correct the deficiencies also does not imply a promise to renew the distributorship in the absence of objective evidence that Miller offered to change its decision. On this evidence, the trial court did not err in granting Miller summary judgment on the breach of contract claim.

B. Beer Brewers and Wholesalers Act.

In 1977 the Minnesota legislature passed the Beer Brewers and Wholesalers Act, Minn. Stat. § 325B.01-.17 (1977). The Act provides, in pertinent part, that contracts between brewers and distributors will automatically renew unless good cause exists for termination or nonrenewal; a distributor will have 90 days after written notice to rectify any deficiencies; and a brewer may not sell beer to a distributor who intends to distribute that beer in a territory already covered by another distributor. The Act was expressly made applicable to all contracts in existence on May 28, 1977.

The trial court determined, on the basis of the Minnesota Supreme Court's decision in *Jacobsen v. Anheuser-Busch, Inc.,* 392 N.W.2d 868 (Minn. 1986), that the Act did not govern the contract between Miller and BWI. In *Jacobsen* the provisions of the Act directly contradicted specific provisions of the contract between Jacobsen and Anheuser-Busch, and the court held that the Act, "applied retroactively to a preexisting agree-

ment between a brewer and a wholesaler as mandated by Minn. Stat. § 325B.15 does unconstitutionally impair the parties' rights and obligations set forth in that preexisting agreement." *Id.* at 875.

The *Jacobsen* court's holding was not limited to the facts of the case before it nor to the specific provision of the act dealing with ownership transfers, and it precludes retroactive application of the Act to the October 8, 1973, contract between BWI and Miller. Because Miller's notice of nonrenewal did not extend the contract by modification, BWI cannot bring the distributorship agreement within the governance of the Act. The trial court did not err in finding that it could not constitutionally apply the Act to the parties in this case.

BWI further asserts that because Miller acted in accordance with the Act (listing BWI's deficient performance and giving 90 days' notice of intent not to renew) and received benefits from the law (BWI's solicitation of unnamed new accounts in the last 90 days of the contract), Miller should be estopped from challenging the Act's constitutionality.

Although the supreme court has held that a taxpayer cannot simultaneously challenge a provision of the tax code when seeking benefits under the same provision, *see Gale v. Commissioner of Taxation*, 228 Minn. 345, 352-53, 37 N.W.2d 711, 716 (1949), that holding has not extended to other constitutional challenges. For example, a party was allowed to challenge two provisions of the Dram Shop Act in a suit seeking benefits under the act. *Wegan v. Village of Lexington*, 309 N.W.2d 273 (Minn. 1981). Even if the court had found that Miller sought benefits under the Act, Miller would not necessarily have been precluded from challenging the Beer Law's constitutionality.

In addition, the alleged "benefit" asserted was that BWI continued to market Miller beer during the 90-day period in the hope of avoiding nonrenewal. The written contract already obligated BWI to "aggressively market and sell Miller beer." Because Miller received only what it was contractually entitled to, it cannot be said to have invoked the Act so as to preclude a constitutional challenge.

C. Implied Covenant of Good Faith and Fair Dealing.

BWI argues that Miller breached an implied covenant of good faith and fair dealing governing the distributorship agreement, citing *Arnott v. American Oil Co.*, 609 F.2d 873 (8th Cir. 1979), and *Bain v. Champlin Petroleum*, 692 F.2d 43 (8th Cir. 1982). Both cases involved franchises, were decided under the laws of other states, and addressed whether arbitrary termination breached the quasi-fiduciary duty imposed on franchisors by law.

BWI's reliance on *American Warehousing v. Michael Ede Management, Inc.*, 414 N.W.2d 554 (Minn. Ct. App. 1987), is similarly misplaced. Although the court held that every non-sales contract contains an implied covenant of good faith which requires that one party not make the other's performance impossible, that implied covenant did not extend to the performance of actions outside the scope of the written agreement. *Id.* at 557-58.

BWI's claims of breach of this covenant do not present evidence that Miller made the 1973 contract impossible to perform. Most of BWI's complaints relate to activities that occurred during the 90 days after Miller's notice of nonrenewal which made the "terms" of Miller's June 28 letter impossible to follow. Because the June 28 letter and activities of the next 90 days did not constitute a new contract, Miller's motives in failing to renew the agreement are immaterial.

See Wild v. Rarig, 302 Minn. 419, 441-42, 234 N.W.2d 775, 790 (1975). The trial court did not err in granting summary judgment on this claim.

D. Fraudulent Inducement.

BWI alleges that before it became a Miller distributor, a Miller representative said that Miller intended to allow BWI to "keep the brand" so long as sales were increasing and that, at Miller's urgings, BWI added computer equipment, trucks, personnel and accounts. Because BWI cites no cases in support of this claim, the precise legal theory on which it relies is unclear. As the trial court noted, remarks from the Miller representative did not rise to the level of an offer and BWI's other activity was already expected under the 1973 contract.

The only misrepresentation alleged is Miller's declaration of intent to let BWI keep the distributorship so long as sales were increasing. BWI provides no evidence to support that allegation and does not allege that the declaration was falsely made to induce BWI to enter into the agreement, or that BWI was justified in relying on the statement in spite of the conflicting terms of the express written agreement. On these facts, the trial court did not err in concluding that BWI failed to raise a genuine issue of fact on this claim.

E. Defamation and Tortious Interference.

BWI bases its tortious interference and defamation claims on evidence that a retailer told BWI that a Miller representative had made a specific derogatory remark about BWI to the retailer. The trial court correctly held this evidence inadmissible hearsay insufficient to raise a fact issue on the tortious interference claim. *See American Warehousing*, 414 N.W.2d at 558.

As BWI points out, the statement by Miller to the retailer, if used to show that Miller made a derogatory statement and

not to prove BWI's deficiencies, would not be hearsay. But BWI advances the retailer's statement to prove the matter asserted for purposes of defamation and tortious interference, and it is therefore hearsay. Minn. R. Evid. 803(3), the state-of-mind exception on which BWI also relies, specifically excludes statements of memory to prove the fact remembered, and no reason appears why, in the decade since this litigation commenced, BWI could not have obtained this evidence in admissible form. The trial court did not err in granting summary judgment on this claim.

BWI's other claims of tortious interference are based on Miller's failure to deliver enough beer, discontinuing manufacture of a particular brand, and other activities which were clearly permitted under the parties' distributorship agreement. The trial court correctly concluded that BWI failed to present disputed material facts to support this claim.

F. Minnesota Antitrust Law.

Minn. Stat. § 325.8013 (1976) makes unlawful any "contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade." A "contract, combination, or conspiracy between two or more persons in competition * * * for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price * * * of any commodity" is deemed to restrain trade unlawfully. Minn. Stat. § 325.8015 (1976) (now codified as Minn. Stat. § 425D.53, subd. 1 (1986)).

Under federal antitrust law, vertical resale price maintenance is per se illegal, and written contracts which fix retail prices are proscribed. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407-08 (1911). Although a manufacturer can lawfully announce resale prices in advance without eliciting an "agreement," it may not secure adherence to

suggested prices "by means which go beyond * * * mere declination to sell to a customer who will not observe * * * announced policy." *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43 (1960).

Much of the litigation in this area involves cases in which a manufacturer terminates a distributor for possibly price-related motivations, and the distributor asserts that he was terminated as part of a price-fixing conspiracy. In such cases the distributor must show (1) the existence of an agreement or conspiracy; and (2) a causal connection between the agreement and the termination. In this case BWI alleges three unlawful combinations: (1) between itself and Miller; (2) between Miller and East Side; and (3) between Miller and distributors nationwide.

A. Miller-BWI.

An unlawful conspiracy can be established if a manufacturer coerces a distributor into a retail price schedule and the distributor acquiesces. *Albrecht v. The Herald Co.*, 390 U.S. 145, 150 n.6 (1968). In such cases, an agreement to fix prices can be inferred from the parties' behavior. However, under *Monsanto Corp. v. Spray-Rite Services Corp.*, 465 U.S. 752, 764 n.9 (1984), "more than a showing that the distributor conformed to the suggested price" is required. There must be evidence that the manufacturer sought such conformity and the distributor communicated its acquiesence. Evidence that a distributor changed its prices in response to coercion may meet this standard. *See Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987).

BWI argues that Miller coerced it into changing its prices on two occasions:

(1) In September 1977 a Miller representative told BWI to set the price for domestic Lowenbrau at $8.56 per case so

that the retail price to consumers would be $.50 per six-pack over the price of Michelob. However, BWI's normal gross profit margin of 22 percent would have required a price of $9.30 per case. The Miller representative told BWI that that price "would be the rape of the Miller Brewing Company" and that marketing research showed that Lowenbrau had to be sold at 50 cents per case over Michelob. Under this "coercive threat," BWI priced Lowenbrau at $8.75.

(2) In January-February 1978 Miller raised its prices to wholesalers, and BWI raised its prices in February. On April 20, 1978, Miller announced another price raise effective June 1. In late May, a Miller representative asked BWI when they were going to raise prices and said if they didn't raise prices soon, Miller would think they didn't need the money and raise its prices to BWI. In mid-June, East Side raised its prices, and BWI raised them shortly thereafter to a level about ten percent below East Side's. On June 28, 1978, Miller sent BWI the termination letter.

BWI does not allege any other instance in which it changed its prices in response to "coercion" by Miller, and the cited examples do not raise a genuine issue of fact on the existence of a price-fixing agreement between Miller and BWI. In neither incident did BWI fully comply with Miller's price "demands," and in the second incident no specific price was even demanded. BWI cites no authority allowing implication of an "agreement" to fix prices where the ultimate price is less than demanded, and the only "coercion" in the facts alleged by BWI appears to have been an unserious remark.

Additionally, BWI's theory is contradictory in that it argues that it had an agreement with Miller on prices, but was terminated because of its refusal to fix prices. At least one

court has approved summary judgment dismissing a claim based on such "mutually exclusive" theories when there was no other evidence of coercion. *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1266 (9th Cir. 1983); *compare Yentsch v. Texaco Inc.*, 630 F.2d 46, 54-55 (2d Cir. 1980) (strong evidence of wide-spread coercion).

B. Miller-East Side.

BWI appears to allege that East Side participated in a price-fixing conspiracy with Miller by dumping bad Lowenbrau in BWI's territory to give Miller a pretext for terminating BWI. However, BWI has produced no evidence that East Side knew of Miller's alleged price-fixing plan, or that it dumped the beer in order to aid that plan. *See Monsanto*, 465 U.S. at 764 ("there must be evidence that tends to exclude the possibility that manufacturer and nonterminated distributors were acting independently"); *Business Electronics Corp. v. Sharp Electronics Corp.*, —— U.S. ——, 108 S.Ct. 1515 (1988) (agreement between manufacturer and nonterminated distributor to terminate a price-cutting distributor is per se illegal only if they also agree on price).

Because BWI does not even allege that East Side and Miller agreed on a price, and East Side may have been independently trying to get rid of bad beer, summary judgment on this claim was appropriate.

C. National Conspiracy.

Finally, BWI claims that Miller was engaged in price-fixing nationwide. There is evidence that Miller conducted extensive research to determine the best market price for Lowenbrau and tried to pressure BWI to set the price accordingly. It also appears that the two pricing chapters in Miller's Lowenbrau Marketing Manual no longer exist.

BWI also lists four instances of pricing pressures in addition to the two to which it acquiesced: (1) a Miller representative tried to get BWI to price Miller Lite at the same price as Schlitz Light and stated that he would deny having tried to get BWI to lower prices; (2) a representative tried to get the price of Miller Lite reduced; (3) a representative asked BWI if it was going to run a price-off promotion; and (4) a representative told BWI that it would not allow it co-op money unless BWI went along with the terms of the co-op (BWI did not go along, but received the co-op money in full).

The last two incidents do not appear coercive, but the first two tend to show that Miller pressured BWI to change its prices. This case is thus distinguishable from *Monsanto* and *Business Electronics,* in which the only evidence of price-fixing consisted of termination in response to complaints by competing dealers.

Nonetheless, in order to establish a nationwide conspiracy to fix prices, BWI would have to show that Miller's price policy (1) was firmly enforced; (2) applied to all distributors; and (3) was acquiesced in by most of them. *Yentsch,* 630 F.2d at 52. The evidence does not raise a genuine issue of fact on these elements. Although the existence of a price policy could be inferred from the disappearance of the price section of the manual and there is evidence that Miller attempted to influence BWI's prices, the record is devoid of evidence that Miller coerced other distributors or that they adhered to any pricing policy.

Under *Monsanto,* 465 U.S. at 762-63, manufacturers do have a legitimate interest in retail prices, and the existence of an agreement to fix them may not be inferred from ambiguous evidence. This case does not present sufficient evidence of coercion and acquiescence to satisfy BWI's burden

of producing evidence that reasonably tends to prove the existence of a common scheme.

Because we conclude that BWI has failed to raise a genuine issue as to any of the alleged price-fixing conspiracies, we do not address whether such conspiracies would be unlawful *per se* under Minn. Stat. § 325.8015, which on its face applies only to agreements among competitors.

II

BWI argues that the trial court abused its discretion in taxing costs against BWI. Specifically, BWI claims that almost $6,000 of the $6,300 costs awarded Miller were for depositions described as cumulative, duplicative, unnecessary and rarely cited in the trial memos.

An award of the costs of discovery depositions is within the discretion of the trial court and will not be reversed absent a clear abuse of discretion. *Streibel v. Minnesota State High School League*, 321 N.W.2d 400, 403 (Minn. 1982). An award of costs for discovery depositions of the plaintiff's two chief officers falls within the discretion of the court.

DECISION

Affirmed.

STATE OF MINNESOTA
County of Hennepin

DISTRICT COURT
Fourth Judicial District

BEER WHOLESALERS, INC.,
and WALLACE C. BOHRER, SR.,

Plaintiffs,

Against

MILLER BREWING COMPANY,
PHILIP MORRIS INCORPORATED, and
EAST SIDE BEVERAGE COMPANY,

Defendants.

JUDGMENT
Date: November 9, 1987

JUDGMENT ROLL
File No. 750 915

This cause having been regularly placed upon the calendar of the above named Court, came on for hearing on the 22nd day of September, 1987, upon motion of defendants for summary judgment, and the Court, after hearing the arguments of counsel and being advised in the premises, did, on the 21st day of October, 1987, duly make and file its order granting said motion and for judgment herein.

Now, pursuant to said order on motion of J. Marquis Eastwood, Esq., one of the Attorneys for the defendants.

IT IS HEREBY ADJUDGED:

1. That defendants' motion for summary judgment in the above entitled action be, and hereby is in all respects, granted.

2. That the Memorandum filed October 21, 1987 be, and hereby is, made a part of this Order.

Judgment on Motion
21-HC 2962 (9/81)

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Court File No. CT 750915

BEER WHOLESALERS, INC., and
WALLACE C. BOHRER, SR.,

Plaintiffs,

vs.

MILLER BREWING COMPANY,
PHILIP MORRIS INCORPORATED,
and EAST SIDE BEVERAGE COMPANY,

Defendants.

ORDER

This matter came on for hearing before the Honorable William P. Christensen on September 22, 1987, on Defendant's Motion for Summary Judgment. Plaintiff was represented by John E. Thomas, Esq. Defendants were represented by J. Marquis Eastwood, Esq., and David Y. Trevor, Esq.

Upon all of the files, records, and proceedings herein, and the Court being duly advised in the premises, the Court finds that there are no material issues of fact in dispute, and the Summary Judgment on behalf of the Defendants is appropriate as a matter of law.

Accordingly, it is hereby ORDERED that Defendants' Motion for Summary Judgment is in all respects GRANTED.

The attached memorandum is hereby made a part of this Order for Judgment.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 20, 1987.

By the Court:
WILLIAM B. CHRISTENSEN
Judge of District Court

MEMORANDUM

Rule 56 of the Minn. R. Civ. Pro. provides in part:

> "A party against whom a claim . . . is asserted . . . may . . . at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

Rule 56.02, Minn. R. Civ. Pro.

The motion shall be granted if the record demonstrates "that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Rule 56.03.

Summary Judgment is appropriate where the evidence brought forth opposing the motion would be insufficient to support a jury verdict. Evidence which is "merely colorable" or "not significantly probative" will not defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S. Ct. 2505, 2511 (1986).

Defendant is entitled to summary judgment if there is no evidence supporting any one of the essential elements of plaintiff's claim. *Celotex Corp. v. Catrett*, —— U.S. ——, 106 S.Ct. 2548 (1986).

The Complaint in this case contains 16 counts, and many of the counts are labeled with two or more different legal theories. The Court will address each count in turn.

* * *

Count 4: Price-fixing: Count four alleges that Miller imposed restraints on BWI as to price, and that Miller's failure to renew is in retaliation for BWI's resistance to Miller's price-fixing activities. It appears that BWI is alleging that Miller conspired with others to fix BWI's resale prices and did not renew BWI because it refused to adhere to Miller's resale price-maintainence conspiracy.

The activity by Miller is allegedly in violation of Minnesota Antitrust Law of 1971, Sec. 325.801 *et. seq.*, and M.S.A. Sec. 325B.09.

Minn. Stat. Sec. 325B.51 provides: "A contract, combination or conspiracy between two or more persons in unreasonable restraint of trade is unlawful." BWI must show that Miller engaged in a "contract, combination or conspiracy" as a threshold to recovery under the Minnesota Antitrust Law.

The standard of proof in cases alleging resale price-maintainence conspiracies is set forth in *Monsanto Corp. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). In *Monsanto*, The United States Supreme Court stated that: "The correct standard is that there must be evidence which tends to exclude the possibility of independent action." *Monsanto* at 764.

The Supreme Court expressly made the *Monsanto* standard applicable to summary judgment motions in *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986). The Court stated: "To survive a motion for summary judgment . . . a plaintiff . . . must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita* at 1471.

In the present case, the Plaintiffs have not presented evidence to exclude the possibility of independent action. Plaintiffs demonstrate no more than that Miller had a legitimate

concern over its prices. That concern was expressly approved by the Supreme Court in *Monsanto*.

In BWI's responses to interrogatories, there are only two references to anyone other than Miller or BWI. Those references to other distributors do not suggest that there was a conspiracy to which Miller was a party. Plaintiffs have not presented evidence which tends to exclude the possibility of independent action as required under *Monsanto* and *Matsushita*. In addition, Plaintiff Wallace Bohrer twice admitted that he did not know anything about Miller's relationship with other distributors (Defendant's memorandum in support of summary judgment motion, at 24).

* * *

W.B.C.

GREGORY'S
7956 Lyndale Avenue South, Bloomington, Minnesota 55420
phone: (612) 881-8611

October 26, 1978

Miller High Life Brewing Co.

Dear Sirs:

I am sorry to hear that the Miller franchise is changing hands in our area from Beer Wholesalers, Inc. to East Side Beverage Co. I understand that this went into effect about October 9th, 1978. At this time I have not yet seen a representative of the new dealer. They have, however, taken it upon themselves to replenish our inventory, on one occasion already. They have also increased the cost of Millers .10 per case.

As far as Beer Wholesalers is concerned, they have always given us notice as to price increases, when they would occur. The service by the driver, Charlie Mohr, has been exceptional; our inventory has been kept rotated and always of adequate supply. The company has regularly shown us promotion materials for Miller products. The service has been constantly efficient.

As I said, I am sorry to see a change and it puzzles me as to why, when a different company takes over an exclusive line, they would not show the courteousness of an introduction, availability of products, and a price list.

Sincerely,
GREG LONG
President/Owner

gl/ir

"Third Generation Restaurant"

STATE OF MINNESOTA
IN SUPREME COURT

C5-88-285

BEER WHOLESALERS, INC.,

Appellant,

WALLACE C. BOHRER, SR.,

Plaintiff,

vs.

MILLER BREWING COMPANY, et al.,

Respondents,

EAST SIDE BEVERAGE COMPANY,

Defendant.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Beer Wholesalers, Inc. for further review be, and the same is, denied.

Dated: 8-24-88.

BY THE COURT:
DOUGLAS K. AMDAHL
Chief Justice